Boston College Law Review

Volume 4 | Issue 1 Article 24

10-1-1962

# Fair Trade—McGuire Act—Absolute Prohibition of Resale Price Maintenance Agreements Between Competitors.—Texas Co. v. DiGaetano

Carl E. Rubinstein

with the result that decisions, such as the present one, will henceforth be above reproach.

PETER N. WELLS

**Fair Trade—McGuire Act—Absolute Prohibition of Resale Price Maintenance Agreements between Competitors.—*Texas Co. v. DiGaetano.*[1]**—A bill in equity was brought by the Texas Company against a gasoline retailer to enjoin the latter from selling Texaco gasoline for less than the minimum prices established by a resale price maintenance agreement which was entered into between the company and another of its retailers.[2] The defendant, though not a party to this agreement, was obligated to comply with the resale prices agreed upon, once he learned of the agreement, by virtue of the "non-signer" provisions of the New Jersey Fair Trade statute.[3] The defendant appealed from an order denying his motion to vacate a final judgment enjoining his "price-cutting" and the Appellate Division of the Superior Court of New Jersey reversed and remanded the decree of the lower court. HELD: The plaintiff oil company could not compete with the defendant retailer for business of a type exempted from the plaintiff's price-resale schedule and at the same time enforce fair trade prices against the retailer in a non-exempted field.

It is by virtue of the Miller-Tydings amendment of the Sherman Act[4] that state-authorized fair trading of goods moving in interstate commerce is lawful, and the application of such price-maintenance agreements to "non-signers" is permitted by the McGuire amendment of the Federal Trade Commission Act.[5] Both of these permissive amendments provide that agreements between "corporations in competition with each other" are expressly prohibited. The defendant in the instant case contended that since he and the plaintiff were "in competition with each other" for commercial and industrial accounts, it would be unlawful to allow the plaintiff to hold him to fair trade restrictions on price with respect to sales to privately owned automobiles.

Plaintiff oil company, perhaps with an eye to the competition provisions of these amendments, had promulgated a New Jersey fair trade price schedule exempting from fair trade prices "sales made by retailer to . . . commercial or industrial concerns or institutional establishments." The schedule stated that the "primary purpose" of the exemption was to enable the Texaco retailers to meet the competition of retailers of other brands selling at lower prices to buses, trucks, tractors and other commercial vehicles.

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1 71 N.J. 413, 177 A.2d 273 (1961).

2 The suit was instituted pursuant to the New Jersey Fair Trade Statute. N.J. Rev. Stat. § 56:4-5 (1940).

3 N.J. Rev. Stat. § 56:4-6 (1940). This statute has been sustained as not violative of due process. See Lionel Corp. v. Grayson-Robinson Stores, 15 N.J. 191, 104 A.2d 304 (1954).

4 26 Stat. 209 (1890), 15 U.S.C. § 1 (1958).

5 The Miller-Tydings Act did not have a non-signer provision. The Supreme Court in Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951), had held that the resale price agreements could not be enforced against non-contracting parties.

Retail sales to individually owned pleasure vehicles remained subject to the specified minimum retail price.

The defendant retailer argued that, by this schedule, the plaintiff had recognized that its retail dealers were doing commercial consumer business from their stations. This, together with evidence tending to show the plaintiff had actively solicited some of the same accounts, was sufficient to establish the "deliberate and substantial activity" needed to bring the case within the rule laid down in *Esso Standard Oil Co. v. Secatore's, Inc.*[6]

In that case, as in this, a gasoline producer sought to compel compliance with state-authorized fair trade price restrictions to which the dealer was not a signatory. The plaintiff in *Secatore*, admitting he serviced several hundred "commercial accounts," nevertheless felt he was entitled to injunctive relief so as to impose fair trade price restrictions on the class of business for which they did not compete: retail sales to private passenger vehicles. The *Secatore* court refused to accept this argument because of the strict interpretation of the Miller-Tydings and McGuire amendments by *United States v. McKesson & Robbins, Inc.*[7]

The last named case involved a drug manufacturer who in addition to selling its own line of products to wholesalers also acted as wholesaler of its own products and those of other manufacturers by making direct sales to retailers. Resale price maintenance agreements were entered into between the manufacturers and the independent wholesalers. The Court held that such agreements between the manufacturer-wholesaler and other independent wholesalers were illegal under the Sherman Act because the McGuire Act immunity explicitly disallows agreements "between wholesalers . . . in competition with each other."[8] McKesson contended that when they entered into these contracts they did so as a manufacturer. The Court was unimpressed stating that resale price maintenance is a "privilege restrictive of a free economy,"[9] and accepted the Government's position that since McKesson competed with the independent wholesalers with respect to the wholesale end of their business they would not be allowed to enforce their resale price maintenance agreements. The Court stated that "the crucial inquiry is whether or not the contracting parties compete with each other." The particular label attached to the activity is of no moment.

The instant case states, as did *McKesson* and *Secatore*, that to fall within the protection of the McGuire amendment the contracting parties must scrupulously adhere to the prohibition of resale price agreements between competitors. The Texas Company attempted to get around this requirement by promulgating separate schedules and failed.

It is submitted that the decision is sound. Since the legislative history of the McGuire amendment did not indicate that any amount of competition between the contracting parties would be tolerated,[10] the New Jersey

[6] 246 F.2d 17 (1st Cir. 1957), cert. denied, 355 U.S. 834.

[7] 351 U.S. 305 (1956).

[8] Id. at 316.

[9] Id. at 313. See also Herman, Fair Trade and McKesson & Robbins, 44 Calif. L. Rev. 853 (1956).

[10] Supra note 6.

court sensibly took the position that since the prohibition was phrased in the absolute, it meant exactly that. Any other decision would have led to a merry-go-round discussion of how much competition is too much.

CARL E. RUBINSTEIN

**Labor Law—Agency Shop Agreements—Invalid under NLRA.**—***General Motors Corp. v. NLRB.***[1]—General Motors had included in its national agreement with the United Auto Workers Union maintenance-of-membership and union shop provisions applicable where these arrangements would not contravene state law. Shortly after an Indiana decision upholding the validity of the agency shop under the law of that state,[2] the union requested that General Motors bargain with respect to adding such a provision to the national agreement to cover the company's plants within Indiana. The company refused to bargain alleging that such an agreement would violate the National Labor Relations Act.[3] The union filed a charge with the NLRB

[1] 45 C.C.H. Lab. L. Rep. ¶ 17,655 (6 Cir. 1962).

[2] Meade Electric Co. v. Hagberg, 129 Ind. App. 631, 159 N.E.2d 408 (1959), noted 3 B.C. Ind. & Com. L. Rev. 91 (1961). The court decided that the state Right-To-Work Law prohibited only the union shop. Unlike some of these statutes, which also prohibit the payment of fees and dues, the Indiana law reads:

> No corporation or individual or association or labor organization shall solicit, enter into or extend any contract, agreement or understanding, written or oral, to exclude from employment any person *by reason of membership or non-membership in a labor organization*, to discharge or suspend from employment or lay off any person by reason of his refusal to join a labor organization. . . . Any such contract, agreement, or understanding, written or oral, entered into or extended after the effective date of this Act, shall be null and void and of no force or effect. (Emphasis added.)

Ind. Stat. Ann. § 40-2703 (Supp. 1959).

[3] 61 Stat. 140 (1947), 29 U.S.C. § 157 (1958). The statute reads:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by *an agreement requiring membership in a labor organization as a condition of employment* as authorized in section 8(a)(3). (Emphasis added.)

61 Stat. 140 (1947), 29 U.S.C. § 158(a)(1) and (3) (1958), as amended 29 U.S.C. 158(3)(i) (1959) provides:

> It shall be an unfair labor practice for an employer—
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> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
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> * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States shall preclude an employer from making *an agreement with a labor organization . . . to require as a condition of employment membership therein* on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . . Provided further, that no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same